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CASES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
HERMAN OPPENHEIMER ET AL. } No. 899.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO DISMISS.

THE FACTS.

February 24, 1914, Herman H. Oppenheimer, defendant in error here, and nine others were jointly indicted in the District Court for the Southern District of New York under section 37 of the Criminal Code for conspiracy to conceal assets from a trustee in bankruptcy in violation of section 29b of the Bankruptcy Act of July 1, 1898, 30 Stat., 544, 554, c. 541. (R. 3–8.) [1] To this indictment the defendant, Oppenheimer, filed a demurrer, pleas in bar and

[1] Wherever the record is referred to, the "Extracts from Transcript of Record," printed by defendant in error, is meant.

abatement, and motion to quash, setting out, among other matters of defense, the one-year bar of limitation to the prosecution of offenses under the Bankruptcy Act prescribed in section 29d thereof. The trial court sustained the plea of limitation, saying (R. 25):

> I therefore find that no lawful indictments were found against Herman H. Oppenheimer, Abraham Samuels, Charles Hepner, and Ray Abrahams, or either of them within one year after the offenses alleged in the indictments, and that their prosecution is barred by section 29*b* (*d*) of the Bankruptcy Act. These indictments are therefore dismissed as to each and all of them.

December 21, 1914, a new indictment was returned in the same court against Oppenheimer and one of his associates for the same offense. (R. 9–14.) January 4, 1915, the defendant Oppenheimer filed four documents which he designated "Motion to Quash," "Plea in Abatement," "Plea in Bar," and "Demurrer." The first ground of defense advanced in *each of these variously termed pleadings* was prior adjudication under the indictments of February 24, 1914, substantially the same words being employed in them all to set out the plea. January 30, 1915, the so-called pleas in bar and abatement were withdrawn, joinder in demurrer filed by the Government, and the demurrer and the so-called motion to quash were argued. (R. 22, 23.) February 2 and 14, 1916, the trial court filed opinions (which are

consolidated in the record) overruling the demurrer; sustaining the motion to quash upon the first ground set up in its support, *i. e.*, prior adjudication; and directing the entry of an order quashing the indictment and discharging the defendant. (R. 23.)

The plaintiff in error seasonably filed assignment of errors, and perfected its writ of error under the Criminal Appeals Act of March 2, 1907, 34 Stat. 1246.

Defendant in error has filed motion to dismiss the writ of error, alleging lack of jurisdiction in this court to review the judgment. The only assignments necessary to be considered in connection with this motion are the first and the seventh:

> I. The Court erred in holding that the action of the Court in quashing the former indictments Nos. 2461 and 2462 were [sic] a bar to a reindictment and prosecution upon a similar charge although the defendant had not been put in jeopardy under said former indictments.
>
> VII. The Court erred in sustaining the motion to quash the indictment.

ARGUMENT.

I.

The so-called motion to quash filed by the defendant is in fact and in law a special plea in bar. The designation given to his pleading by a defendant can not change its essential nature. This court will disregard the misnomer and act upon the fact.

Under the Federal system of criminal procedure the matters alleged in the so-called motion to quash constituted a special plea in bar, and the grounds on which the district court sustained the motion could only have been appropriate to a ruling upon a special plea in bar—viz., that the indictment was barred by former jeopardy or by limitation. This court has jurisdiction under the Criminal Appeals Act to review the decision and determine whether the bar of jeopardy had attached or the bar of limitation had accrued.

The first ground set up by defendant in error in support of what he styled his "motion to quash," and upon which the court below based its decision, was (R. 15):

> It appears from the records of this Court that the indictment herein is barred by reason of the adjudication *in re* United States against the same parties who are defendants in this indictment, numbers 2461 and 2462.

This constituted a special plea in bar, whether it was intended to present the defense of former acquittal, or did, in effect, renew the prior plea of limitation set up in bar of the first indictment. The bar of former jeopardy *must* be pleaded specially and that of limitation *may* be.

Bishop's New Crim. Proc., 1913, vol. 2, p. 623:

> Matter in bar,—occurring after the offense was committed,—as, a conviction or acquittal or another indictment, or a pardon,—must be pleaded specially.

Ib., vol. 2, p. 623:

> The statute of limitations may be pleaded specially, and sometimes it is. Yet this defence is permissible under the general issue.

The plea of not guilty was withdrawn and the general issue never joined. Limitation, if pleaded at all, was pleaded specially in this case.

See also *United States* v. *Barber* (1910), 219 U. S. 72, 77.

Numerous other pleas were embodied in the same "motion to quash," which is a hodge podge of special pleas in bar, plea in abatement, demurrer, and motion to quash; but all these were overruled by the trial court, and its ruling based solely upon the first special plea in bar quoted. *Supra.* After overruling the other pleas and stating that the indictment formerly found and dismissed was legally identical with the one here involved, the trial judge said:

> With this as a premise, the disposition made of the first indictment is material. The sufficiency of that was before Judge Thomas upon a motion to quash, and was decided by him on October 1, 1914. His decision, which, of course, was in advance of any submission to or swearing of a jury, quashed the indictment and discharged the defendants thereunder. This decision proceeded upon the ground that the

prosecution was barred by the Statute of Limitations. No appeal was taken by the Government from this decision, and thus from October 1, 1914, when the decision was rendered, until December 21, 1914, when this indictment was found, there was nothing pending against these defendants. Should the prosecution under this last indictment be allowed to proceed when there is outstanding a judgment in favor of the defendants to the effect that the Statute of Limitations has run against their alleged offense? The Government urges that this may be done, and further sets forth to the court the fact that since the decision of Judge Thomas a decision of the Circuit Court of Appeals for this Circuit, *as well as a decision by the Supreme Court of the United States*, has shown that the Statute of Limitations did not run until three years after the offense instead of one year as held by him, and that his decision was thus erroneous. This latter, however, does not impress me as being of relevance provided the defendants have heretofore been heard upon this issue, have been discharged thereunder, and that judgment being unappealed from remains in force and effect. The decision of Judge Thomas in my judgment became the law of the case, and until reversed, protected the defendants from further prosecution arising upon the same state of facts. While, of course, were the case open to decision upon the question of limitation, the decision of the appellate courts would control, yet the law of the case having been settled previous to these decisions, the defendants should not be subjected to another prosecution while the judgment quash-

> ing the indictment and discharging them still remains in force and effect. To hold otherwise is to subject the citizen to a series of prosecutions when the law contemplates that once having a decision in his favor he should, until such decision is reversed, be allowed to go unmolested by another proceeding on the same charge. [Italics ours.]

It is well settled in the criminal jurisprudence of this country that a defendant is not placed in jeopardy by any ruling or judgment obtained upon his motion or plea prior to the impaneling of a jury, and that no such ruling or judgment will preclude the bringing of a new indictment for the same offense and a trial thereunder. No jury was ever impaneled in this case.

Kepner v. *United States* (1903), 195 U. S. 100, 128:

> Undoubtedly in those jurisdictions where a trial of one accused of crime can only be to a jury, and a verdict of acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused.

Bishop's New Criminal Law, 8th ed., vol. 1, sec. 1027, par. 4:

> Where, at any stage of the proceedings, the defendant procures the indictment to be quashed, he cannot in bar to a new one assert that the first is good, and he was in jeopardy under it.

12 Cyc. 265:

> As a general rule, where an indictment is quashed on motion as insufficient, or a demurrer

thereto is sustained, and the accused is thereupon discharged, there is no such jeopardy as will bar prosecution on another indictment for the same offense (citing authorities from the appellate courts of Alabama, Arkansas, California, Indiana, Massachusetts, Michigan, Missouri, New York, Pennsylvania, South Carolina, Tennessee, Virginia, and Wisconsin).

Commonwealth v. *Gould* (1858), 12 Gray (Mass.), 171, 173:

> But the effect of *quashing* an indictment is like that of a *nol. pros.* of it, or of its being adjudged bad on demurrer, or of an arrest of judgment for a defect therein, after a verdict of guilty has been returned; by neither of which is a defendant acquitted of the offense with which the indictment charged him, but is exempted only from liability on *that indictment.*
>
> The plea of former acquittal is allowed and sustained on a maxim of the common law, that no one shall be brought into jeopardy more than once for the same offence. But when an original indictment is *quashed,* adjudged bad on demurrer, or when judgment thereon is arrested for a defect therein, it is held that the accused has not thereby been in jeopardy, within the meaning of that maxim. *Commonwealth* v. *Wheeler,* 2 Mass. 172. *Commonwealth* v. *Roby,* 12 Pick. 502. *Rex* v. *Burridge,* 3 P. W. 500, by Lord Hardwicke. 2 Hawk. c. 35. 2 Gabbett Crim. Law, 332. Archb. Crim. Pl. (13th ed.) 118 *& seq.*

See also:

United States v. *Rogoff* (1908), 163 Fed. 311, 312;

United States v. *Van Vliet* (1885), 23 Fed. 35;

Ex Parte Lange (1873), 18 Wall. 163, 173, 174;

Shoener v. *Pennsylvania* (1907), 207 U. S. 188, 195, 196;

Joy v. *State* (1860), 14 Ind. 139, 148;

Pritchett v. *State* (1854), 2 Sneed (Tenn.) 285;

State v. *Fley* (1809) (S. C.), 4 Am. Dec. 583, 587;

Duffy v. *Britton* (1886), 48 N. J. L. 371, affirming decision reported in 18 Vroom, 251, 253;

Marshall v. *Commonwealth* (1871), 20 Gratt. (Va.), 845, 846.

The court below evidently confused the doctrine of *res judicata* in civil cases with the somewhat similar doctrine of former jeopardy in criminal cases. The defendant in error falls into like confusion when he says (brief, 12–13):

> But the *form* of pleading *res adjudicata* is immaterial so long as the necessary facts appear in the plea.

The plea of *res adjudicata* is unknown to the criminal law. The attempt to interpose it here is novel, but not allowable.

Am. & Eng. Ency. of Law (2d ed.), v. 24, p. 830:

> The rule that a former adjudication is a bar to another action for the same claim or demand has its counterpart in criminal law in the doctrine of former jeopardy. But the two

rules, while similar in purpose and effect, are otherwise separate and distinct subjects.

Ex Parte Lange (1873), 18 Wall. 163, 168:

> The principle finds expression in more than one form in the maxims of the common law. *In civil cases* the doctrine is expressed by the maxim that no man shall be twice *vexed* for one and the same cause. *Nemo debet bis vexari pro una et eadem causa.* It is upon the foundation of this maxim that the plea of a former judgment for the same matter, whether it be in favor of the defendant or against him, is a good bar to an action.
>
> *In the criminal law* the same principle, more directly applicable to the case before us, is expressed in the Latin, "*Nemo bis punitur pro eodem delicto,*" or, as Coke has it, "*Nemo debet bis puniri pro uno delicto.*" No one can be twice *punished* for the same crime or misdemeanor, is the translation of the maxim by Sergeant Hawkins.

The designation of the plea upon which the judgment here was had is immaterial in arriving at its true character. The defendant termed it a motion to quash; but the court below, while so designating it, really treated it as a special plea in bar—as it should have been treated—and gave judgment upon it as such. Under the established rules of criminal procedure it was impossible to treat it otherwise, and this court will so consider it.

In *United States* v. *Adams Express Company* (1912), 229 U. S. 381, objection was made to the jurisdiction of this court to review a judgment

sustaining a motion to quash service, which it was contended did not fall within the language of the Criminal Appeals Act. Apparently, a judgment of that character did not fall within the specific terms of that act, but this court said (p. 388):

> It is objected that this court has no jurisdiction of the present writ of error under the act of March 2, 1907, c. 2564, 34 Stat. 1246, and that the court below had no authority to treat the motion of Barrett as equivalent to a demurrer. Without following the defendant into the niceties by which it seeks to escape the jurisdiction of this court after having eluded that of the court below, it is enough to say that in our opinion, *if we are to go behind the entry, the decision entered was one setting aside the indictment and was based upon the construction of the statute upon which the indictment is founded, within the meaning of the act of March 2, 1907.* [Italics ours.]

In *United States* v. *Barber* (1910), 219 U. S. 72, the defendant pleaded the bar of limitations as a plea in abatement, and counsel and the court below so termed it. On writ of error, the jurisdiction of this court to review a judgment upon what was denominated a plea in abatement, but constituted a plea in bar, was questioned. Mr. Chief Justice White conclusively settled the point, saying (p. 77, 78):

> So far as the claim based upon the stipulation is concerned, it is plainly without merit, since we can only look to the judgment which was actually entered to determine what was decided with respect to the fourth count, and

> the court in that judgment expressly placed its decision that the United States could not prosecute the defendants upon the plea of the bar of limitations. The claim that the pleas were not in bar but merely on abatement is we think equally untenable. *The designation of the respective pleas, as a plea in abatement, did not change their essential nature.* [Italics ours.]

Defendent in error contends that since he withdrew pleading which he actually termed his "plea in bar" it cannot now be held that the ground upon which the motion to quash was sustained constituted a "special plea in bar." The first ground of the actual plea in bar which was withdrawn was:[1]

> 1. It appears from the records of this Court that the indictment herein is barred by reason of the adjudication by this Court on the indictments in this Court, in re United States against the same parties who are defendants in this indictment, which indictments were numbered 2461 and 2462.

It may be noted that almost the same words were used in the first ground set up in the plea in abatement, also withdrawn.

The first ground of the so-called motion to quash, as well as the first ground of what was termed a demurrer, reads:

> 1. It appears from the records of this court that the indictment herein is barred by reason

[1] This does not appear in the printed "Extracts from Transcript of Record," but appears in the full record of the case, and is here quoted by stipulation with the defendant.

> of the adjudication in re United States against the same parties who are defendants in this indictment, numbers 2461 and 2462. (R. 15.)

Comparison of the pleas withdrawn, and those left in the record and argued, upon which the case was decided, discloses their substantial identity.

Defendant withdrew his plea, which was properly styled a plea in bar, but secured a consideration of and judgment upon identically the same plea under the misnomer of "motion to quash." He now seriously advances the contention that his erroneous designation of his own pleading may be used to defeat plaintiff in error's contention. Comment is unnecessary.

The point is also raised that where a defendant files a plea in bar the United States must either demur to it or answer, and that neither was done in this case. As heretofore pointed out, defendant in error set out former adjudication as the first ground of what he called a demurrer and the first point in his alleged motion to quash, and the lower court rendered its decision solely upon that plea. The Government filed a joinder in demurrer, which was the proper method to join issue upon the pleas filed by defendant under the designations which he had given them. It would be rather paradoxical and wholly unsound to permit a party to set up the same plea in two, three, four, or any number of instruments—all identical in words, or substantially so, and exactly identical in import—designate each instrument by such name as pleased his fancy; withdraw

all save one, which he incorrectly entitled a motion to quash, or a demurrer, when it was really a special plea in bar; and then attempt to hold his antagonist to a strict compliance with what he apparently believes to be the rule of pleading with regard to answering or traversing a special plea. The joinder in demurrer filed by plaintiff in error in response to defendant in error's demurrer to the indictment and motion to quash, was sufficient to join the issue, if, indeed, any character of pleading was necessary to be filed. Certainly defendant in error can not by affixing a misnomer to one of his pleas attempt now to hold the Government to rules of strict pleading, and contend that it should have answered his plea in its true character when he himself had otherwise entitled it.

II.

A decision upon a special plea in bar when the defendant has not been put in jeopardy is subject to review here whether or not it involves the construction of the statute upon which the indictment is based.

Defendant in error contends that under the Criminal Appeals Act a writ of error can be had on a decision sustaining a special plea in bar only when the validity or construction of the statute upon which the indictment is based is involved, quoting an excerpt from the opinion of this court in *United States* v. *Kissel* (1910), 218 U. S. 601, 606, in support. The contention is without merit, and the expression quoted is wholly misconstrued. The language employed in

the third clause of the act is plain and unambiguous, and gives the Government the right to a review by this court of any decision "sustaining a special plea in bar when the defendant has not been put in jeopardy." In the *Kissel* case, as well as the *Keitel* case cited therein, many points were advanced by the Government upon which a review was sought, and lengthy and elaborate briefs were filed covering matters of which no review was authorized by the Criminal Appeals Act. Discussing these, this court in effect stated that it would consider only the particular character of decisions designated by that statute, saying (pp. 606–607):

> We deem it unnecessary to state the pleadings with more particularity, because the only question before us under the act of March 2, 1907, c. 2564, 34 Stat. 1246, is whether the plea in bar can be sustained. That this court is confined to a consideration of the grounds of decision mentioned in the statute when an indictment is quashed was decided in *United States* v. *Keitel*, 211 U. S. 370, 399. We think that there is a similar limit when the case comes up under the other clause of the act, from a "judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." This being so, we are not concerned with the technical sufficiency or redundancy of the indictment, or even, in the view that we presently shall express, with any consideration of the nature of the overt acts alleged.

While this language is clear, the sense in which it was employed is even more distinctly emphasized in the *Keitel* case (1908), 211 U. S. 370, 398–399:

> In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very terms of the statute to authority to re-examine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same.

III.

The order of the court entered upon the motion to quash in effect sustained the one-year bar of limitation, and directly involved a construction of the statute upon which the indictment was founded.

The court based its order sustaining the plea of former adjudication upon the decision of Judge Thomas on the demurrer and motion to quash filed by the defendants under the first indictments found. That decision was to the effect that the one year bar of limitation prescribed by the Bankruptcy Act applied; and was based upon a clear misconstruction of the statutes involved. The opinion rendered

and order entered in this case will perpetuate that error unless relief can be had in this court.

In *United States* v. *Rabinowich* (1915), 238 U. S. 78, involving a precisely similar indictment, this court held that the one year statute of limitation did not apply; that as the offense charged was conspiracy and not a violation of the bankruptcy law, the three year statute of limitation governed, and the indictment was not barred. That decision was conclusive of the law in the instant case, and the court below cannot, by merely referring to and adopting the erroneous decision of Judge Thomas under the former indictments, thus indirectly defeat the plain right of plaintiff in error to have the substantial effect of the ruling now complained of reviewed under the Criminal Appeals Act. The identical question of law, arising in exactly the same manner, is involved here as was presented in the *Rabinowich* case, *supra*, and the jurisdiction of this court to review the question was there definitely and conclusively fixed.

United States v. *Nixon* (1914), 235 U. S. 231, 236:

> In rendering that decision he made a ruling of the very kind which the United States was entitled to have reviewed under the provisions of the Criminal Appeals Act (34 Stat. 1246). If that were not so the right of the Government could in any case be defeated by entering a general order of dismissal, without referring to the statute which was involved or without giving the reasons on which the decision was based.

The effect of the decision in the case at bar was to sustain a motion to quash the indictment upon the construction of a statute upon which it was founded; and the right to a review is given in the first clause of the Criminal Appeals Act.

CONCLUSION.

It is respectfully submitted that the motion to dismiss should be denied.

JOHN W. DAVIS,
Solicitor General.
CHARLES WARREN,
Assistant Attorney General.

APRIL, 1916.

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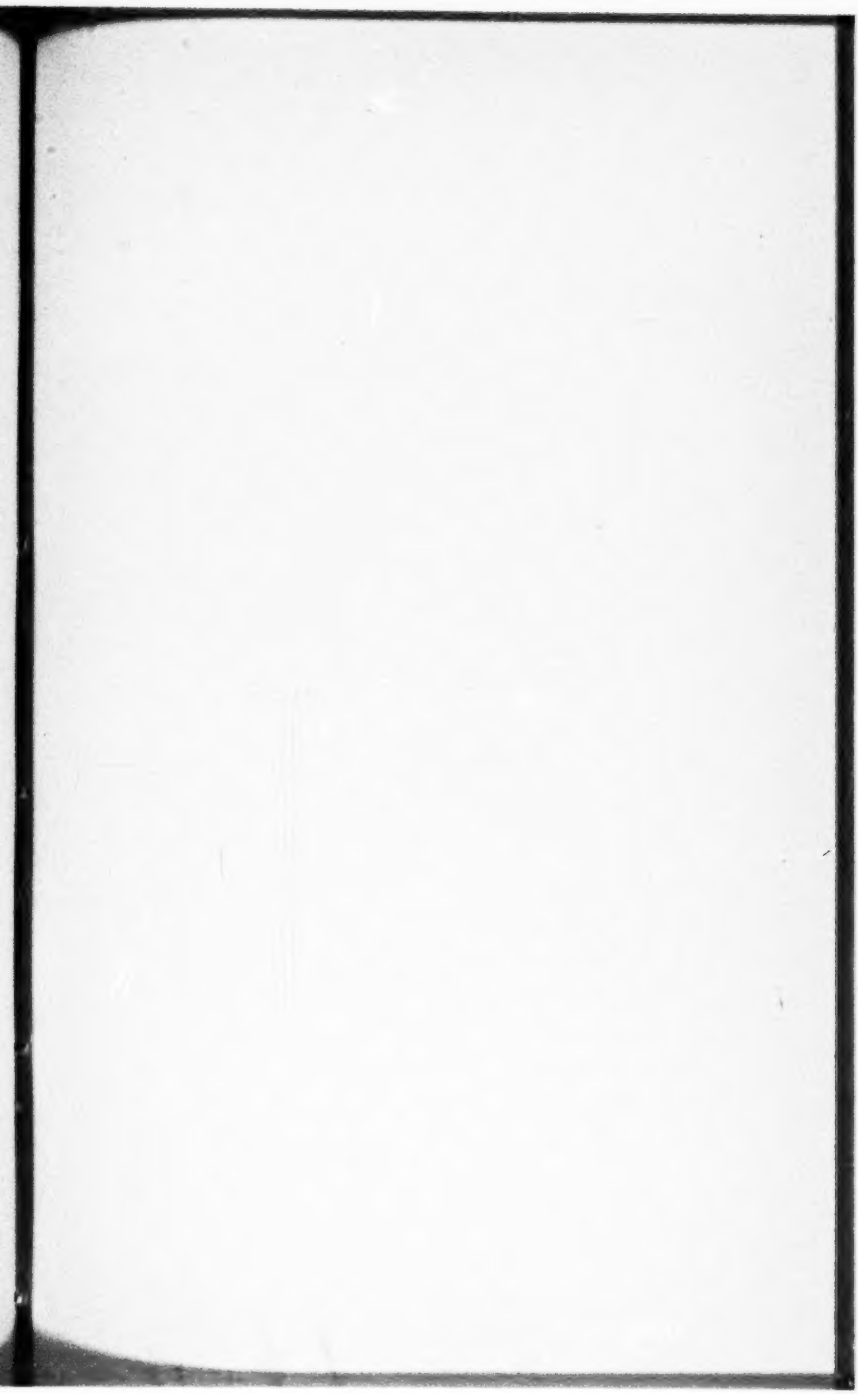

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OCTOBER TERM, 1916.

THE UNITED STATES, PLAINTIFF IN ERROR, *v.* HERMAN H. OPPENHEIMER ET AL. } No. 899.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

February 24, 1914, two indictments, numbered, respectively, 2461 (R. 3–8) and 2462 (R. 8–13), were returned in the District Court for the Southern District of New York against Herman H. Oppenheimer, the defendant in error here, and a number of others, under section 37 of the Criminal Code, for conspiracy to conceal assets from a trustee in bankruptcy, in violation of section 29b of the bankruptcy act of July 1, 1898 (30 Stat. 544, 554). To these indictments, the defendant Oppenheimer filed a demurrer and what he designated "Motion to quash plea in bar

and abatement" (R. 14, 15), setting out in each of these pleadings the one-year bar of limitation to the prosecution of offenses under the bankruptcy act prescribed in section 29d thereof. Judge Thomas, the trial judge, considered these pleadings of Oppenheimer and of three of the co-defendants charged in the respective indictments, saying (R. 45, 46):

> Four of the defendants, Herman H. Oppenheimer, Abraham Samuels, Charles Hepner, and Ray Abrahams, are represented by counsel, and pleadings bearing various titles have been filed in their behalf. Each of these four last-mentioned defendants in his pleadings asks that the indictment, so far as it relates to him, be quashed for the reason that the acts alleged in the indictment are barred by the statute of limitations contained in section 29d of the Bankruptcy Act. Said section reads as follows:
>
> "A person shall not be prosecuted for any offense arising under this act unless the indictment is found or the information is filed in court within one year after the commission of the offense."
>
> In my opinion the above-quoted section is determinative of the issues presented by the indictment against the aforenamed defendants who have, in their pleadings attacking the indictment, invoked the provision of said section, hence there is no occasion to determine other questions raised by pleadings, some of which are of vital importance and decisive.

And discharged the defendants October 1, 1914, saying (R. 47):

> I therefore find that no lawful indictments were found against Herman H. Oppenheimer, Abraham Samuels, Charles Hepner, and Ray Abrahams, or either of them, within one year after the offenses alleged in the indictments, and that their prosecution is barred by section 29d of the bankruptcy act. These indictments are therefore dismissed as to each and all of them.

December 21, 1914 (in the same year) (R. 16–21), a new indictment, numbered 2882, was returned in the *same* District Court against Oppenheimer and some of the *same* parties included in the previous indictments of February 24, 1914, charging the *same* offense—i. e., conspiracy to conceal assets from a trustee in bankruptcy; this new indictment alleging a later and additional overt act in furtherance and continuance of the result of the conspiracy—viz, that Oppenheimer had falsely testified in a hearing before a referee in bankruptcy, January 19, 1914, that he had received no money or property in the bankruptcy cases upon which this indictment was based. The later indictment unquestionably charged a continuing conspiracy. December 22, 1914, Oppenheimer filed a plea of not guilty, which was withdrawn January 21, 1915. (R. 44, 45.) January 4, 1915, Oppenheimer filed four pleadings which he respectively designated "Demurrer" (R. 22, 23), "Motion to quash" (R. 24, 25), "Plea in abatement" (R. 53, 55), and "Plea in bar" (R. 55–57). The first ground of defense advanced in

each of these variously termed pleadings was prior adjudication under the indictments of February 24, 1914, the defendant using the following language in the respective pleadings to set out this defense:

DEMURRER.

> 1. It appears from the records of this court that the *indictment herein is barred* by reason of the adjudication in re United States against the same parties who are defendants in this indictment, numbers 2461 and 2462. (R. 22.)

MOTION TO QUASH.

> 1. It appears from the records of this court *that the indictment herein is barred* by reason of the adjudication in re United States against the same parties who are defendants in this indictment, numbers 2461 and 2462. (R. 24.)

PLEA IN ABATEMENT.

> 1. It appears from the records of this court that the *indictment herein is barred* by reason of the adjudication in re United States against the same parties who are defendants in this indictment, numbers 2461 and 2462. This indictment sets forth and is based on the same conspiracy as the last indictment, which last indictment is hereby made a part of this plea together with the opinion and order thereon now on file in this court. (R. 53.)

PLEA IN BAR.

> 1. It appears from the records of this court that the *indictment herein is barred* by reason of the adjudication by this court on the in-

> dictments in this court, in re United States against the same parties who are defendants in this indictment, which indictments were numbered 2461 and 2462. (R. 56.)

January 30, 1915, the so-called plea in bar and plea in abatement were withdrawn; *joinder in demurrer was filed by the Government*, and the demurrer and the so-called motion to quash were argued before Judge Pope, of the District of New Mexico, then sitting in the Southern District of New York (R. 45). February 14, 1916, Judge Pope filed an opinion and decision, overruling the demurrer *in toto*, although, singularly enough, it embodied the identical defense, *res adjudicata*, upon which he based his decision, and was no more erroneously included in the one pleading than the other. Portions of his opinion pertinent to this case are as fo lows (R. 47–49):

OPINION.

> The demurrer and the *motion to quash* filed by the several defendants proceed upon a number of grounds. All of these have been carefully examined.
>
> * * * * * * *
>
> The only ground which impresses the court as serious as against the validity of the present indictment arises out of the following state of facts:
>
> An indictment was found against these same defendants on February 24, 1914, which, in legal effect, is identical with the indictment here under consideration. This latter statement is made advisedly, notwithstanding the

fact that the present indictment, found December 21, 1914, contains an alleged overt act in addition to those set forth in the indictment of February 24. In other respects the indictments are practically identical. An examination of the additional overt act alleged in the last indictment leads to the view that, notwithstanding certain conclusions of law therein set forth, the matters therein stated cannot, from their nature, constitute an overt act under the conspiracy alleged in each of the indictments. It follows, therefore, as stated above, that the two indictments are legally identical.

With this as a premise, the disposition made of the first indictment is material. The sufficiency of that was before Judge Thomas upon a motion to quash, and was decided by him on October 1, 1914. His decision (which of course was in advance of any submission to or swearing of a jury) quashed the indictment and discharged the defendants thereunder. This decision proceeded upon the ground that the prosecution was barred by the statute of limitations. No appeal was taken by the Government from this decision, and thus from October 1, 1914, when the decision was rendered, until December 21, 1914, when this indictment was found, there was nothing pending against these defendants. Should the prosecution under this last indictment be allowed to proceed when there is outstanding a judgment in favor of the defendants to the effect that the statute of limitations has run against their alleged offense? The Govern-

ment urges that this may be done, and further sets forth to the court the fact that since the decision of Judge Thomas a decision of the Circuit Court of Appeals for this Circuit, as well as a decision by the Supreme Court of the United States (*United States* v. *Rabinowich*, 1915, 238 U. S. 78) [inserted by us], has shown that the statute of limitations did not run until three years after the offense instead of one year as held by him, and that his decision was thus erroneous. This latter, however, does not impress me as being of relevancy, provided the defendants have heretofore been heard upon this issue, have been discharged thereunder, and that judgment being unappealed from remains in force and effect. The decision of Judge Thomas in my judgment became the law of the case, and, until reversed, protected the defendants from further prosecution *arising upon the same state of facts.* (Italics ours.) While, of course, were the case open to decision upon the question of limitation, the decision of the appellate courts would control, yet the law of the case having been settled previous to these decisions, the defendants should not be subjected to another prosecution while the judgment quashing the indictment and discharging them still remains in force and effect. To hold otherwise is to subject the citizen to a series of prosecutions when the law contemplates that once having a decision in his favor he should, until such decision is reversed, be allowed to go unmolested by another proceeding on the same charge.

> An order will accordingly be entered quashing the indictment of December 21, 1914, and allowing the defendants to go without day thereunder.
>
> This January 29, 1916.

In conformity with this opinion and decision, Judge Hand, of the United States District Court for the Southern District of New York, entered an order, February 26, 1916, which recites (R. 49):

> A motion to quash the indictment herein having been filed by the defendant, Herman H. Oppenheimer, and having duly come on to be heard before the Honorable William H. Pope, district judge, on the 29th day of January, 1915;
>
> Now, after reading the decision and opinion of Honorable William H. Pope, United States district judge, dated January 29, 1916, and filed in the office of the clerk of the District Court of the United States for the Southern District of New York on February 2, 1916, and the amended opinion of said judge, it is
>
> Ordered and adjudged, that the motion to quash made by the defendant, Herman H. Oppenheimer, be granted, and the indictment is hereby quashed and the defendants allowed to go without day thereunder.

The United States seasonably filed assignment of errors (R. 50) and perfected its writ of error under the Criminal Appeals Act of March 2, 1907, 34 Stat., 1246. (R. 50, 51, 1, 2.)

At the last term of this Court, plaintiff in error filed a motion to advance, which was granted, and

defendant in error filed a motion to dismiss the writ of error, alleging lack of jurisdiction in this Court to review the judgment. This motion was passed to be considered in connection with the whole case at this term.

Statute Involved.

The Criminal Appeals Act of March 2, 1907, 34 Stat., 1246, provides:

> That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.
>
> *From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.*

Specifications of Error.

I. The court erred in designating the plea upon which its decision was based a "Motion to quash" instead of a "Special plea in bar," which it really was.

II. The court erred in holding that the prosecution was barred by the decision quashing the former indictments against the defendant in error.

III. The court erred in holding that the last overt act—i. e., the one alleged to have been committed January 19, 1914—set out in the indictment herein did not constitute an overt act under the conspiracy alleged in the indictment, and that the former indictments and this indictment are legally identical.

The Questions Involved.

Besides the questions raised on the assignment of errors, defendant in error, in his brief on his motion to dismiss, suggests other questions which will be briefly noted herein.

I.

Can the jurisdiction of this Court be divested by an erroneous designation of a plea by the defendant filing it or by the trial court passing upon it, either or both?

II.

Was not the plea upon which the trial court based its decision in this case, in law and in fact, a special plea in bar and not a motion to quash, and has not this Court jurisdiction under the Criminal Appeals Act to review a decision or judgment sustaining such a plea, *however pleaded,* when the defendant has not been put in jeopardy?

III.

Is not the construction of a statute—section 37 of the Criminal Code—involved in the decision of the court quashing the indictment?

IV.

Was the defendant in error placed in jeopardy by the decision of the trial court sustaining his plea of limitation to the first indictments?

V.

Did not the alleged false statement made by the defendant in error before the referee in bankruptcy on January 19, 1914, constitute an overt act in furtherance of the alleged conspiracy to conceal the assets of the bankrupt and the result thereof, and render the indictment herein different from those theretofore quashed; and bar the application of "the law of the case" upon which Judge Pope founded his decision?

VI.

Does the plea of *res adjudicata* have any application to a decision in a criminal case, based upon a preliminary plea in bar, filed and passed upon by the court, before a jury has been sworn?

VII.

Was the writ of error, assignment of errors, or citation, or either of them, defective; and if so, would such defects, or any of them, be sufficient to invalidate the writ?

ARGUMENT.

I.

The so-called "motion to quash" filed by the defendant was in fact and in law a special plea in bar. The designation given to his pleading by defendant or by the court below can not change its essential nature. This Court will disregard the misnomer and act upon the fact. It has jurisdiction under the Criminal Appeals Act to review the decision in this case and determine whether the bar of jeopardy had attached.

Judge Pope based his decision upon the first ground set up by the defendant in error in his so-called "Motion to quash," viz (R. 24):

> 1. It appears from the records of this court *that the indictment herein is barred by* reason of the adjudication in re United States against the same parties who are defendants in this indictment, numbers 2461 and 2462.

While it is quite clear that this plea constituted a special plea in bar, whatever it may have been designated, the language of the pleader "*that the indictment herein is barred*" plainly discloses that he so regarded it. Whether it was intended to advance the defense of former jeopardy or of *res adjudicata*, as the defendant in error termed it, or renew the defense of limitation, the first two defenses *must* be pleaded specially, and the last can be pleaded only under the general issue. Necessarily all constitute special pleas in bar, however pleaded.

Bishop's New Crim. Proc., 1913, vol. 2, p. 623:

> Matter in bar—occurring after the offense was committed, as a conviction or acquittal or another indictment, or a pardon—must be pleaded specially.

In a case of this character, charging a continuing conspiracy, the plea of limitation could be pleaded only under the general issue. It was error to plead it specially, as was done in this case, and, under the Criminal Appeals Act, this Court has reversed a case of this character, i. e., of continuing conspiracy, where otherwise pleaded. (*United States* v. *Kissel* [1910], 218 U. S. 601, 610.)

It is wholly immaterial that the pleader styled his pleading "Motion to quash," since the judge in the court below could not have rendered the decision he did upon a motion to quash. This Court will treat the pleading in its true character.

A motion to quash is in the nature of a demurrer, and according to the great weight of authority may be employed only to raise questions as to defects which are apparent upon the fact of the indictment.

See *Encyclopedia, Pleading and Practice*, p. 569, and cases cited.

In *Durland* v. *United States* (1895), 161 U. S. 305, the Court said (314):

> These objections were raised by the motion to quash the indictment, but such a motion is ordinarily addressed to the discretion of the court, and the refusal to quash is not, generally, assignable for error.

In *United States* v. *Pond* (1855), 2 Curt 265, the circuit court said:

> A motion by the defendant to quash an indictment must be founded on defects which would make a judgment against him, on that indictment, erroneous.

It is evident that the excerpts quoted *supra* would not justify the inclusion of a special plea in bar in a motion to quash, since the matter of finally sustaining such a motion being within the discretion of the trial court, that court, regardless of the Criminal Appeals Act, could indirectly sustain a special plea in bar filed under the designation of a motion to quash and leave the Government absolutely remediless to come to this Court under that act. Neither is the particular ground embodied in the motion to quash in this case upon which the opinion to sustain was based addressed to any defect in the indictment, and Judge Pope in his opinion expressly stated (R. 47, 48) that there were no defects therein. It is quite clear, therefore, that the plea was erroneously designated under the rules governing criminal procedure in United States courts.

See also Archb. Criminal Practice and Pleading (Pomeroy's notes, 8th ed.), 318:

> In all cases where an indictment is so defective that any judgment to be given upon it against the defendant would be erroneous, the court in its discretion may quash it.

Judge Pope stated, in effect, that a judgment upon the indictment here would not be erroneous. It was

to prevent a valid judgment being entered upon a good indictment that he sustained the special plea in bar erroneously plead in the motion to quash.

In *United States* v. *Adams Express Company* (1912), 229 U. S. 381, objection was made to the jurisdiction of this Court to review a judgment sustaining a motion to quash service, which it was contended did not fall within the language of the Criminal Appeals Act. Apparently, a decision of that character did not fall within the specific terms of the act, but this Court said (p. 388):

> It is objected that this court has no jurisdiction of the present writ of error under the act of March 2, 1907, c. 2564, 34 Stat. 1246, and that the court below had no authority to treat the motion of Barrett as equivalent to a demurrer. Without following the defendant into the niceties by which it seeks to escape the jurisdiction of this court after having eluded that of the court below, it is enough to say that in our opinion, *if we are to go behind the entry, the decision entered was one setting aside the indictment and was based upon the construction of the statute upon which the indictment is founded, within the meaning of the act of March 2, 1907.* [Italics ours.]

In *United States* v. *Barber* (1910), 219 U. S. 72, the defendant set up the bar of limitations as a plea in abatement, and counsel and the court below so termed it. On writ of error, the jurisdiction of this Court to review a judgment upon what was denominated a plea in abatement, but constituted a plea in

bar, was questioned. Mr. Chief Justice White conclusively settled the point, saying (p. 77, 78):

> So far as the claim based upon the stipulation is concerned, it is plainly without merit, since we can only look to the judgment which was actually entered to determine what was decided with respect to the fourth count, and the court in that judgment expressly placed its decision that the United States could not prosecute the defendants upon the plea of the bar of limitations. The claim that the the pleas were not in bar but merely in abatement is, we think, equally untenable. *The designation of the respective pleas, as a plea in abatement, did not change their essential nature.* [Italics ours.]

Defendant in error contends in his brief that since he withdrew a pleading which he actually termed his "plea in bar" it can not now be held that the ground upon which the motion to quash was sustained constituted a "special plea in bar."

The ground upon which Judge Pope's decision was based, whether considered as setting up former jeopardy, *res adjudicata*, or limitation, constituted a special plea in bar and could have constituted nothing else. This Court has jurisdiction to review such a decision provided only the defendant was not placed in jeopardy.

Defendant withdrew the plea which was properly styled a plea in bar, but secured a consideration of, and judgment upon identically the same plea under the misnomer of "motion to quash." He now seriously advances the contention that his erroneous

designation of his own pleading may be used to defeat plaintiff in error's contention. Comment is unnecessary.

The point is also raised that, where a defendant files a plea in bar, the United States must either demur to it or answer, and that neither was done in this case. As heretofore pointed out, defendant in error set out former adjudication as the first ground of what he called a demurrer and as the first point in his alleged motion to quash; and the lower court rendered its decision solely upon the latter plea. The Government filed a joinder in demurrer, which was the proper method to join issue upon the pleas filed by defendant under the designations which he had given them. It would be rather paradoxical and wholly unsound to permit a party to set up the same plea in two, three, four, or any number of instruments—all identical in words, or substantially so, and exactly identical in import—designate each instrument by such name as pleased his fancy; withdraw all save one, which he incorrectly entitled a motion to quash, or a demurrer, when it was really a special plea in bar; and then to attempt to hold his antagonist to a strict compliance with what he apparently believes to be the rule of pleading with regard to answering or traversing a special plea. The joinder in demurrer filed by plaintiff in error in response to defendant in error's demurrer to the indictment and motion to quash, was sufficient to join the issue, if, indeed, any character of pleading was necessary to be filed. Certainly defendant in error can not by affix-

ing a misnomer to one of his pleas attempt now to hold the Government to rules of strict pleading, and contend that it should have answered his plea in its true character when he himself had otherwise entitled it.

II.

The defendant was not placed in jeopardy under the former indictments nor did the decision of Judge Thomas, on the pleas to those indictments become res adjudicata. The erroneous decision that the indictments were barred by the one-year statute of limitations was rendered upon preliminary pleas which were interposed before any submission to or the swearing of a jury, and under such condition jeopardy could not attach or the case be finally determined on its merits.

In his opinion and decision in this case Judge Pope says, referring to the decision of Judge Thomas (R. 48): "His decision (*which of course was in advance of any submission to or swearing of a jury*) quashed the indictment and discharged the defendants thereunder." (Italics ours.)

In any contested case, a person charged with crime can be *tried* in a court of the United States only before a jury, and judgment of conviction or acquittal can be entered only upon the jury's verdict. Unless he plead guilty, the guilt or innocence of a defendant must be determined by a jury, and, in its absence, it is impossible for jeopardy to attach or for the case to become *res adjudicata*.

Kepner v. *United States* (1903), 195 U. S. 100, 128, 129:

> Undoubtedly in those jurisdictions where a trial of one accused of crime can only be to

a jury, and a verdict of acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. * * *

The Constitution of the United States, in the Fifth Amendment, declares, "nor shall any person be subject to be twice put in jeopardy of life or limb." The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial. *An acquittal before a court* having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense. *Commonwealth* v. *Peters*, 12 Met., 387; 2 Hawk. P. C., c. 35, sec. 3; 1 Bishop's Crim. Law, sec. 1028.

Bishop's New Criminal Law, 8th ed., vol. 1, sec. 1027, par. 4:

Where, at any stage of the proceedings, the defendant procures the indictment to be quashed, he can not in bar to a new one assert that the first is good, and he was in jeopardy under it.

12 Cyc., 265:

As a general rule where an indictment is quashed on motion as insufficient or a demurrer thereto is sustained and the accused is thereupon discharged, there is no such jeopardy as will bar a prosecution on another indictment for the same offense (citing authorities from the appellate courts of Alabama,

Arkansas, California, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, New York, Pennsylvania, South Carolina, Tennessee, Utah, Virginia, and Wisconsin).

Commonwealth v. *Gould* (1858), 12 Gray (Mass.) 171, 173:

> But the effect of *quashing* an indictment is like that of a *nol. pros.* of it, or of its being adjudged bad on demurrer, or of an arrest of judgment for a defect therein, after a verdict of guilty has been returned; by neither of which is a defendant acquitted of the offense with which the indictment charged him, but is exempted only from liability on *that indictment.*
>
> The plea of former acquittal is allowed and sustained on a maxim of the common law, that no one shall be brought into jeopardy more than once for the same offense. But when an original indictment is *quashed*, adjudged bad on demurrer, or when judgment thereon is arrested for a defect therein, it is held that the accused has not thereby been in jeopardy, within the meaning of that maxim. *Commonwealth* v. *Wheeler*, 2 Mass. 172. *Commonwealth* v. *Roby*, 12 Pick. 502. *Rex* v. *Burridge*, 3 P. W. 500, by Lord Hardwicke. 2 Hawk. c. 35. 2 Gabbett Crim. Law, 332. Archb. Crim. Pl. (13th ed.) 118 & *seq.*

See also, *United States* v. *Rogoff* (1908), 163 Fed. 311, 312; *United States* v. *Van Vliet* (1885), 23 Fed. 35; *Ex Parte Lange* (1873), 18 Wall. 163, 173, 174; *Shoener* v. *Pennsylvania* (1907), 207 U. S. 188, 195, 196; *Joy* v. *State* (1860), 14 Ind. 139, 148; *Pritchett* v. *State* (1854), 2 Sneed (Tenn.) 285; *State* v. *Fley* (1809) (S. C.), 4 Am. Dec. 583, 587; *Duffy* v. *Britton* (1886), 48 N. J. L. 371, affirming decision reported in 18 Vroom 251, 253; *Marshall* v. *Commonwealth* (1871), 20 Gratt. (Va.) 845, 846.

Both the court below and the defendant in error in his brief on his motion to dismiss appear to have considered the decision of Judge Thomas on the motion to quash the first indictment as constituting *res adjudicata* in this case, Judge Pope, in his opinion, saying (R. 48, 49):

> The decision of Judge Thomas in my judgment became the law of the case, and, until reversed, protected the defendants from further prosecution arising upon the same state of facts.

The defendant in error says in his brief (brief of defendant in error on motion to dismiss, 12-13):

> But the *form* of pleading *res adjudicata* is immaterial so long as the necessary facts appear in the plea.

And (ib. 15):

> The decision was really "*res adjudicata*," a defense which can be set up at any time in any plea or in a special plea without other name. In fact it can be of the Court's own motion at any time, when the law may come to its attention.

What Judge Pope really decided was that the defendant had been placed in jeopardy under the former indictment, that the bar of limitation had attached, or that the principle of *res adjudicata* applied. Each of the conclusions is erroneous.

The plea of *res adjudicata* is apparently unknown to the criminal law. The attempt to interpose it here is novel, but not allowable.

Am. & Eng. Ency. of Law (2d ed.), v. 24, p. 830:

> The rule that a former adjudication is a bar to another action for the same claim or demand has its counterpart in criminal law in the doctrine of former jeopardy. But the two rules, while similar in purpose and effect, are otherwise separate and distinct subjects.

Ex Parte Lange (1873), 18 Wall. 163, 168:

> The principle finds expression in more than one form in the maxims of the common law. *In civil cases* the doctrine is expressed by the maxim that no man shall be twice *vexed* for one and the same cause. *Nemo debet bis vexari pro una et eadem causa.* It is upon the foundation of this maxim that the plea of a former judgment for the same matter, whether it be in favor of the defendant or against him, is a good bar to an action.
>
> *In the criminal law* the same principle, more directly applicable to the case before us, is expressed in the Latin, "*Nemo bis punitur pro eodem delicto*," or, as Coke has it, "*Nemo debet bis puniri pro uno delicto.*" No one can be twice *punished* for the same crime or misdemeanor, is the translation of the maxim by Sergeant Hawkins.

III.

The first ground of the pleading, termed "Motion to quash," really renewed the defense of the one-year bar of limitation embodied in section 29d of the Bankruptcy Act which had been sustained to the former indictments, and necessarily involved a construction of the conspiracy statute (Criminal Code, section 37) under which the indictment here involved was brought.

The motion to quash was sustained by Judge Pope upon the ground that the decision of Judge Thomas under the former indictments holding that the one-year bar of limitation prescribed in the Bankruptcy Act was applicable, instead of the three-year bar to the conspiracy statute, constituted the "law of the case" and that the prosecution was accordingly barred by the rule of *res adjudicata*. This Court, in *United States* v. *Rabinowich* (238 U. S. 78), which was based upon an indictment for conspiracy to conceal assets in violation of section 29b of the Bankruptcy Act, held that the three-year bar applied.* The decision in the *Rabinowich case* (1915) necessarily

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The case of *United States* v. *Rabinowich* involved the same point as was raised in the first *Oppenheimer case*, and arose in the same district. After the decision by Judge Thomas, October 1, 1914, in the first *Oppenheimer case*, Judge Hough, following that decision, held in the *Rabinowich case*, November 25, 1914, that the one-year statute of limitations, and not the three-year statute, applied, and consequently overruled a demurrer filed by the United States to the defendant's special plea in bar setting up the one-year statute of limitations. The United States took an appeal to the Supreme Court under the Criminal Appeals Act and a writ of error was allowed December 8, 1914. On June 1, 1915, the Supreme Court overruled Judge Hough, sustained the Government demurrer, and held that the three-year statute of limitations applied. Meanwhile, during the period when the *Rabinowich case* appeal was pending in the Supreme Court, the second Oppenheimer indictments were found, December 21, 1914.

governs this case; and Judge Pope, in his opinion here, written in 1916, by merely referring to and adopting the erroneous decision of Judge Thomas on the former indictment can not defeat the right of plaintiff in error to have the construction of the conspiracy statute reviewed here.

IV.

A decision upon a special plea in bar when the defendant has not been put in jeopardy is subject to review here, whether or not it involves the construction of the statute upon which the indictment is based.

Defendant in error contends that under the Criminal Appeals Act a writ of error can be had on a decision sustaining a special plea in bar only when the validity or construction of the statute upon which the indictment is based is involved, quoting an excerpt from the opinion of this Court in *United States* v. *Kissel* (1910), 218 U. S. 601, 606, in support. The contention is without merit, and the expression quoted is wholly misconstrued. The language employed in the third clause of the act is plain and unambiguous, and gives the Government the right to a review by this Court of any decision "sustaining a special plea in bar when the defendant has not been put in jeopardy." In the *Kissel case*, as well as in the *Keitel case* cited therein, many points were advanced by the Government upon which a review was sought, and lengthy and elaborate briefs were filed covering matters of which no review was authorized by the

Criminal Appeals Act. Discussing these, this Court in effect stated that it would consider only the particular character of decisions designated by that statute, saying (pp. 606–607):

> We deem it unnecessary to state the pleadings with more particularity, because the only question before us under the act of March 2, 1907, c. 2564, 34 Stat. 1246, is whether the plea in bar can be sustained. That this court is confined to a consideration of the grounds of decision mentioned in the statute when an indictment is quashed was decided in *United States* v. *Keitel*, 211 U. S. 370, 399. We think that there is a similar limit when the case comes up under the other clause of the act, from a "judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." This being so, we are not concerned with the technical sufficiency or redundancy of the indictment, or even, in the view that we presently shall express, with any consideration of the nature of the overt acts alleged.

While this language is clear, the sense in which it was employed is even more distinctly emphasized in the *Keitel Case* (1908), 211 U. S. 370, 398–399:

> In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the ex-

ceptional right to review in favor of the United States is limited by the very terms of the Statute to authority to reexamine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same.

V.

The indictment in this case alleges that an additional overt act was committed by the defendant in error less than one year before it was brought, and as limitation begins to run from the commission of the last overt act and not from the date of the formation of the conspiracy, the decision of Judge Thomas discharging the defendants under the former indictments on the plea of the one year bar can have no application in this case and necessarily can not become the law of the case or constitute res adjudicata.

All the overt acts set out in the first indictments were alleged to have occurred in the year 1912 and the conspiracy was charged to have been effected in that year. The indictment in this case charges (R. 20, 21):

> And further, in pursuance of and to effect the object of said conspiracy and in order to aid and assist the said Jacques Samuels, Joseph Samuels, Abraham Samuels, Charles Hepner, Herman J. Dietz, and Herman H. Oppenheimer, in continuing the conceal-

ment from said trustee in bankruptcy of the money and property belonging to the said estates in bankruptcy of the said Joseph Samuels & Co., so concealed from said trustee in bankruptcy, the said Herman H. Oppenheimer, in a bankruptcy proceeding instituted and pending in the United States District Court for the Southern District of New York, to have the said Jacques Samuels and one Benjamin Lesser, individually and as copartners, doing business under the firm name of Abrahams & Lesser, adjudged bankrupts under the bankruptcy laws of the United States, and of which copartnership the said Jacques Samuels was a member and principal owner, was examined before the said Macgrane Coxe, Esquire, referee in bankruptcy, in support of an application made by the said Herman H. Oppenheimer for an allowance as the attorney for the said copartnership of Abrahams & Lesser and the said Jacques Samuels as a member of said copartnership; *and the said Herman H. Oppenheimer did, then and there, on the 19th day of January, 1914, willfully and falsely testify, in substance and effect, that he had, since the latter part of July, 1912, and up to the said 19th day of January, 1914, received no money or property in said bankruptcy action so pending against Joseph Samuels & Co.*, individually and as a copartnership as aforesaid, as compensation for legal services, *except that he, the said Herman H. Oppenheimer, had received an agreement to be paid compensation in addition to whatever*

allowance might be made to him by the court for such services out of the estates in bankruptcy of said Joseph Samuels & Co., individually and as a copartnership, as aforesaid, whereas, in truth and in fact, *the said Herman H. Oppenheimer did, on or about the 1st day of September, 1912, receive from the said Jacques Samuels a promissory note in and for the sum of $897.36, with interest, made by the Universal Textile Company, a customer of said Joseph Samuels & Co.*, dated July 20, 1912, payable two months after date, to the order of Joseph Samuels & Co., *and did thereafter*, on September 11, 1912, receive payment therefor in the sum of $897.36, which said promissory note and its proceeds was the property of the said copartnership of Joseph Samuels & Co. and would, in the due administration of the said estates in bankruptcy, have belonged to the said estates in bankruptcy; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Sec. 37 U. S. C. C. and sec. 29b of the bankruptcy act.)

The alleged false statement of the defendant in error in the hearing before the referee in bankruptcy was made in continuance of the result of the conspiracy and with the intent to deprive the estate of the bankrupt of a portion of its assets. Had the defendant in error testified truly that he had received and collected the note for $897.36, the referee forthwith would have ordered him to return the money to

the trustee of the bankrupt's estate. His denial served to continue the result of the conspiracy and reduce the assets of the estate. Under the circumstances, the plea of limitations sustained by Judge Thomas had no application and could not constitute *res adjudicata* here.

It is well settled that in a case of continuing conspiracy limitation runs from the commission of the last overt act.

Brown v. *Elliott* (1912), 225 U. S. 392, 401:

> And where during the existence of the conspiracy there are successive overt acts, the period of limitation must be computed from the date of the last of them of which there is appropriate allegation and proof, and this although some of the earlier acts may have occurred more than three years before the indictment was found.

The alleged false statement made by the defendant in error before the referee in bankruptcy, who was endeavoring to ascertain what had become of the assets of the estate, constituted an overt act, continued the conspiracy and the result thereof, and Judge Pope was clearly in error when he stated that the previous indictments and the one here under consideration were legally identical. They were not

United States v. *Kissel* (1910), 218 U. S. 601, 607, 608:

> The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agree-

ment is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. *United States* v. *Irvine*, 98 U. S. 450. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one.

* * * * *

A conspiracy is constituted by an agreement, it is true, but *it is the result of the agreement*, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract but is a result of it. *The contract is instantaneous, the partnership may endure as one and the same partnership for years.* A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that *an overt act of one partner* may be the act of all without any new agreement specifically directed to that act.

VI.

This point is suggested by the brief of the defendant in error on his motion to dismiss:

The contentions of the defendant in error that (1) the errors assigned are insufficient, and (2) that the writ of error and citation are defective, because the names of all parties indicted are not specifically mentioned therein, are not sustained by the authorities cited.

(1) The errors assigned are simply and clearly stated, and afford sufficient basis to support the points previously argued in this brief.

(2) The defendant in error cites a number of civil cases to show that the citation and writ of error should have contained the names of all parties who are jointly indicted for the offense charged. In civil cases it is axiomatic that all necessary parties to the original cause of action shall be included, either by name or notice given, in an appeal on the merits. When necessary parties who are cast in a civil action do not desire to appeal and some of their co-defendants do, it has been held that the service of notice upon their co-defendants by the party or parties who did desire to appeal, or the appearance of all defendants, was necessary; and most of the cases cited by the defendant in error are to this effect. Those cases have no application here.

It is elementary that the Government may indict a number of parties for an offense, and if, upon investigation, it be concluded that some of them can not be convicted upon the testimony which can be

adduced, or that the Government may need the testimony, induced by promise of immunity to some who are really guilty but less culpable than others, upon which to convict the more guilty actors, it has always been held allowable for the Government to dismiss or *nol. pros.* such of the defendants indicted as it chose. This is the rule in the trial courts. Necessarily, the same rule obtains in the matter of writs of error brought by the Government. In this particular case six people were indicted; only two plead to the indictment, viz, Herman H. Oppenheimer and Herman J. Dietz (R. 44, 45). The opinion and decision of Judge Pope (R. 47) styled the case, "*The United States of America*, Plaintiff, v. *Jacques Samuels, Joseph Samuels, Abraham Samuels, Herman J. Dietz, Charles Hepner,* and *Herman H. Oppenheimer,* Defendants, No. 7–278." The caption of the order of Judge Hand (R. 49) was in the same style, and yet the last paragraph of that order read:

> Ordered and adjudged, that the motion to quash made *by the defendant, Herman H. Oppenheimer,* be granted, and the indictment is hereby quashed and the *defendants* allowed to go without day thereunder.

Naturally, the court had no power to discharge defendants, who had, so far as the record discloses, neither been arraigned nor even entered appearance before it. The citation in error (R. 51) was indorsed, "*United States of America* v. *Herman H. Oppenheimer, et al.*" The writ of error (R. 1) runs as to *Her-*

man H. Oppenheimer et al., and is indorsed (R. 2) in like style.

The Government chose only to bring its writ of error as to Herman H. Oppenheimer, one of the six defendants indicted, one of the two entering appearance, and the only one mentioned by name in the court's order of discharge. That was its privilege; the other defendant arraigned, Herman J. Dietz, was not a necessary party to this proceeding, and the time within which writ of error might have been perfected as to him has long since expired. The principle that governs in all of the civil cases cited by the defendant in error has no bearing here. The citation and the writ of error, while they did not bear the names of all the parties indicted, nor even of the two arraigned in the preliminary proceeding, were amply sufficient to bring the defendant in error before this Court, and the right of the United States to do so can not be defeated by the citation of a number of decisions in civil cases involving the presence of necessary parties to the suit when the appearance of Herman H. Oppenheimer alone is necessary to the prosecution of this writ of error.

In a criminal proceeding, while jointly brought and tried, each party charged stands upon his own defense. A number may be jointly indicted; some acquitted, the indictment dismissed as to some, others convicted, some of them appeal, and others accept sentence and decline to do so. Any convicted man may appeal, but he is under no

compulsion of law to do so because his fellow convicts may. Neither is the Government under any legal obligation to bring writs of error as to all defendants obtaining a favorable decision on a preliminary plea because it brings the matter up as to one or more. The right of the Government to come to this Court, circumscribed as it is, can not be further abridged by applying the legal principles governing civil proceedings to its only remedy in criminal cases. No defendant was sought to be brought before this Court save Herman H. Oppenheimer, and he is properly here.

CONCLUSION.

It is respectfully submitted that the case should be reversed and the defendant ordered to stand for trial.

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